Date: January 2, 1997

Case No.: 95-INA-00113

In the Matter of:

CAMCOT, INC., d/b/a
AMCOT COOLING TOWER CO.,
Employer

On Behalf Of:

CHUN-YI LIAO,
Alien

Appearance: Haresh Jambusaria, Esq.
For the Employer/Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(14) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182(a)(14) (1990) ("Act"). The certification of aliens for permanent employment is governed by § 212(a)(5)(A) of the Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On June 30, 1993, Camcot, Inc. (d/b/a Amcot Cooling Tower Co.) ("Employer") filed an application for labor certification to enable Chun-Yi Liao ("Alien") to fill the position of Cost/Budget Comptroller (AF 61-62). The job duties for the position are:

> Prepare corporate monthly, quarterly, and annual financial statements, payroll, payroll/sales/corporate tax filings; maintain/enhance system for accountancy/ financial analysis using computer and compatible softwares; audit review cost of goods, and operational expenditures, analyze cost data to arrive at cost ratios, and advise management on cost cut back and control; may adviase [sic] management re property/liability insurance coverage needed, and prepare financial report to overseas manufacturer.

The requirements for the position are a Bachelor's Degree in Business, majoring in Accounting or Management, with a minor in computer science, and two years of experience in the job offered or in the related occupation of Controller/Treasurer of a cooling water tower manufacturer. Other Special Requirements are experience in preparing payroll/corporate tax, financial statements, and audit; courses of study or experience must include insurance science, computer language "Basic," business computer/software, database concept, and data management/analysis; and the applicant must also be familiar with the cost of labor and parts of water cooling towers, and must read and write Chinese (AF 61, 63).

The CO issued a Notice of Findings on February 23, 1994 (AF 49-59), proposing to deny certification due to: (1) the prevailing wage; and, (2) the foreign language requirement. The CO determined that the offered wage of $3,400.00 per month is below the prevailing wage of $4.929.00 per month, and stated that although the Employer submitted a statement which attempted to justify the offered wage, that statement does not demonstrate that: (1) the wage has not increased to prevailing; (2) the wage has not increased to within 5 percent or exceeds the prevailing wage; (3) the Employer's wage is under a union contract; (4) the prevailing wage has been misread and is inaccurate; (5) the Government's survey is invalid; (6) a valid survey in the area of employment was not submitted; (7) the Employer's wage is under a separate wage system; (8) wage is a "Davis Bacon" or "McNamara O'Hara" determination; and, (9) the Employer has

[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

conducted his own wage survey. The CO also determined that the foreign language requirement appears to be unduly restrictive and excessive and tailored to meet the Alien's background and qualifications, and stated that although the Employer submitted documentation which attempted to justify the foreign language requirement, it does not explain: (1) how will the foreign language be used in the job duties (what must be explained and why can't it be explained in English); (2) how was the work completed in the past without the foreign language; (3) will the absence of the foreign language adversely impact the business; (4) how is the foreign language handled with other ethnic groups; and, (5) what percentage of the business is dependent on the foreign language.

Accordingly, the Employer was notified that it had until March 30, 1994, to rebut the findings or to cure the defects noted. The Employer requested an extension of time on March 28, 1994, to file rebuttal (AF 47).

In its rebuttal, dated April 6, 1994 (AF 11-46), the Employer contended that: (1) the prevailing wage of $4,929.00 per month quoted by the State Job Service is too high; and, (2) the foreign language requirement is a business necessity. The Employer stated that:

> . . . the State Job Service Alien Certificiation [sic] staff has determined $2,800.00 for the same position, similar job description with requirement of Bachelor's degree in Business without experience requirement met prevailing wage on May 5, 1993; note that the job offered required a Bachelor's degree in Business plus two years experience, and should not be considered as a senior level position (kindly refer to the certified Labor Certification under Exhibit B), and therefore we believe using the median annual salary as quoted on OOH of $35,800 per year (i.e. $2,983.33 per month) is reasonable, and that our wage offer is actually over the prevailing wage; please see ***Exhibit C,*** copy of Prevailing Wage determined by State Job Service Alien Certification staff dated May 5, 1993; (emphasis supplied in original).

Regarding the foreign language requirement, the Employer stated that 50 percent of the standard duties included in the offered position, require that the employee "will have to prepare accounting reports and cost control proposal for management and overseas supplier's use." The Employer further stated that the employee will use the Chinese language while communicating with the manufacturer in Taiwan regarding "cost issues, financial report, reading Chinese in review cost of goods, cost data analysis for cost cut back and control, and writing financial report to oversea manufacturer in Chinese." The Employer contended that prior to the Alien's hire, there was no in-house Controller; a CPA firm did all the Controller's duties and the President of the Company communicated with the overseas manufacturer directly regarding accounting/ financial issues. The Employer also stated that without the ability to speak, write, and read in Chinese, the employee will not be able to perform the duties of cost review and analyze on cost cut back/control. The Employer finally stated that only two employees, the Alien and the President of the Employer, speak the Chinese language.

The CO issued the Final Determination on May 10, 1994 (AF 8-10), denying certification. The CO determined that the Employer's rebuttal regarding the prevailing wage issue refers to the

Occupational Outlook Handbook (1992 - 1993 Edition) ("OOH"), which cannot be accepted because "it is not in the specific area of intended employment. The OOH wage determination is a nation wide average of wages paid to Financial Managers." Additionally, the CO determined that the Employer has failed to demonstrate that the offered wage is more accurate for the area of intended employment than the Labor Market Information Survey cited by the local Job Service Office. In conclusion, the CO stated that the Employer has failed to adequately rebut the NOF,[2] and remains in violation of the regulations at 20 C.F.R. §§ 656.20(c)(2), 656.40(c), 656.25(e)(1)(3), and 656.26(g).[3]

On June 16, 1994, the Employer requested review of the Denial of Labor Certification (AF 1-7). In November 1994 the CO forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board").

Discussion

In order to effectively test the job market for the availability of U.S. workers for a particular position, as well as to insure that the wages and working conditions are not adversely affected by the employment of the alien, the employer must offer the job at the prevailing wage. Under § 656.20(c)(2), an employer is required to offer a wage that equals or exceeds the prevailing wage determined under § 656.40. Section 656.40(a)(2)(i) defines the prevailing wage as the average wage for workers similarly employed in the area of intended employment, and allows for a five percent variation from the prevailing wage. If an employer is notified that its wage offer is below the prevailing wage, but fails either to raise the wage to the prevailing wage or to justify the lower wage, certification is properly denied. *Science General Aerospace Corp.*, 88-INA-480 (Jan. 11, 1990). See also, *Emil Sztykiel*, 88-INA-67 (Mar. 1, 1989); *Ashwin L. Shaw*, 88-INA-290 (Nov. 2, 1989).

In the NOF for the present case, the CO notified the Employer that it is offering the job opportunity below the prevailing wage of $4,929.00 per month. He stated that this wage rate was based on a survey by the Merchant and Manufacturers Association, which is a professional organization that gathers, examines, and measures labor market facts and figures information. He further stated that this wage survey is appropriate because it is considered objective, professional, and in the geographical/professional specific area of intended employment. The CO instructed the Employer that it could rebut the NOF by doing one of the following: (1) increasing the rate of pay to prevailing and readvertise the job opportunity; (2) showing that the wage offer is within 5 percent of the prevailing wage or exceeds the prevailing wage; (3) contesting the prevailing wage finding; or, (4) showing that the Employer's wage is under union contract.

In this case, the Employer chose to contest the prevailing wage finding. Generally, when challenging the CO's prevailing wage determination, an employer bears the burden of establishing

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[2] The CO did not mention the foreign language issue in the FD. It is well settled that the Board will not consider issues not preserved by the CO in the FD. See, *Loew's Anatole Hotel*, 89-INA-230 (Apr. 26, 1991) (*en banc*); *Drs. Preisig & Alpern*, 90-INA-35 (Oct. 17, 1990).

[3] 20 C.F.R. § 656.26(g) appears to be an incorrect citation as no such section exists.

both that the CO's determination is in error, and that the employer's wage is at or above the prevailing wage. *PPX Enterprises, Inc.*, 88-INA-25 (May 31, 1989) (*en banc*). Specifically, the CO instructed the Employer that it may refer to another survey which is more valid for the occupation in the Employer's labor market. The CO further informed the Employer that it must also demonstrate that his survey is more accurate for the area of intended employment than the Labor Market Information Survey cited by the Local Job Service Office.

In rebuttal, the Employer did not challenge directly either the methodology or the applicability of the prevailing wage determination utilized by the CO. Rather, the Employer attempted to discount the validity of the CO's prevailing wage with contradictory evidence obtained from several other sources. First, the Employer pointed to the OOH, which figured the median annual salary of financial managers as $35,800.00. Next, the Employer submitted a certified labor certification (in an unrelated case) for the position of Treasurer which required an MBA in Accounting/Finance plus two years of experience. The wage offered for this position was $2,550.00. Finally, the Employer argued that the State Job Service Alien Certification staff has determined that $2,800.00 per month is the prevailing wage for the same position with a similar job description and requirements, excluding the two-year experience requirement. Although the Employer submitted these three items to support its position regarding the prevailing wage, it essentially relies on the OOH as evidenced by the statement, "we believe using the median annual salary as quoted on OOH of $35,800 per year (*i.e.* $2,983.33 per month) is reasonable, and that our wage offer is actually over the prevailing wage."

We find that the Employer has not satisfied its initial burden in this case, as it has not offered any evidence indicating the prevailing wage put forth by the CO is in error or that its own calculations are more accurate for the intended area of employment as required by *PPX Enterprises, supra.*

Even if the Employer had satisfied this burden, we further find that the Employer's own calculation is flawed for several reasons. First, the Occupational Outlook Handbook is a Nationwide survey and is not in the specific area of intended employment. See *Heritage Bindery,* 89-INA-351 (Dec. 11, 1990). Furthermore, the term Financial Manager encompasses a very broad range of job opportunities, including accountants, budget analysts, credit analysts, insurance analysts, loan officers, and securities analysts. Likewise, the certified Labor Certification for a Treasurer, although containing some of the same job duties, is dated June 1990 and thus not the best indicator of the current prevailing wage for the job opportunity in this case.[4] Finally, the State Alien Job Survey does not include an experience requirement and, as such, naturally contains a lower prevailing wage than a job opportunity requiring two years of experience. Therefore, the Employer's calculation is speculative, over-broad, and it does not account for variation from region to region.

[4] Moreover, the fact that labor certification may have been granted in another unrelated case has no precedential value here.

Therefore we find that the Employer failed to offer the job at the prevailing wage and failed to adequately rebut the CO's prevailing wage calculation. Accordingly, the CO's denial of labor certification was proper.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered this the _____ day of January, 1997, for the Panel:

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RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.